

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ARDOTH E. HILTON)	
Claimant)	
VS.)	
)	Docket No. 173,733
THE BOEING COMPANY - WICHITA)	
Respondent)	
AND)	
)	
AETNA CASUALTY & SURETY COMPANY)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Claimant appeals from an Award entered by Administrative Law Judge Jon L. Frobish on February 24, 1997. The Appeals Board heard oral argument July 11, 1997.

APPEARANCES

Kelly W. Johnston of Wichita, Kansas, appeared on behalf of the claimant. Eric K. Kuhn of Wichita, Kansas, appeared on behalf of the respondent and its insurance carrier. Randall C. Henry of Hutchinson, Kansas, appeared on behalf of the Kansas Workers Compensation Fund.

RECORD AND STIPULATIONS

The Appeals Board considered the record identified in the Award. In addition, the Appeals Board considered the report of Dr. Steven J. Howell which the parties have stipulated may be received into evidence. The Appeals Board has adopted the stipulations

listed in the Award and, in addition, the Appeals Board notes the parties have stipulated to the admission of the bill for high-top shoes prescribed by Dr. J. Stanley Jones. The record before the Appeals Board does not include that bill, however, claimant's counsel indicates it has been submitted and already paid. Payment of that bill will be addressed as part of the award.

ISSUES

In the Application for Review, claimant described the issues as follows:

- (1) Claimant's burden of proof.
- (2) Whether claimant is entitled to healing period compensation for the compensable left lower leg disability.
- (3) Whether claimant's right ankle avascular necrosis was aggravated, intensified, or accelerated as a result of prolonged standing and walking on cement over weeks, months, and years up to and including September 13, 1992.
- (4) If claimant's right ankle permanent impairment is compensable, then whether claimant is entitled to separate scheduled injuries for her right and left lower legs, or whether she is entitled to a general bodily nonscheduled disability.
- (5) Whether future medical benefits for her left or right ankle avascular necrosis should be awarded.

At the time of oral argument, respondent's counsel indicated respondent had no objection to an award for the healing period for the left lower leg disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant began working for respondent in 1987 in the sheet metal department. Her work required her to be on her feet most of the time and required her to walk and stand on concrete surfaces.

On September 15, 1992, claimant sprained her left ankle when she stepped in a hole in the parking lot on Boeing premises. In the course of treatment for this injury, claimant discovered she suffers from avascular necrosis of both ankles. Claimant contends that her avascular necrosis has been aggravated by working on her feet on concrete surfaces in the course of her employment for respondent. Claimant contends that the left ankle was aggravated also by the accident on September 15, 1992. According to claimant, she is entitled to a general body disability. Work disability is not an issue.

Respondent does not contest the compensability of claimant's left ankle sprain and avascular necrosis. Respondent does dispute the compensability of the right ankle disability.

The Administrative Law Judge found that the avascular necrosis in claimant's right ankle was not caused by standing and working on concrete surfaces and was not compensable. Although claimant's counsel points out that Dr. J. Stanley Jones testified that avascular necrosis could be caused by standing on concrete surfaces, claimant argues primarily that the condition has been aggravated by claimant's work activities. The Administrative Law Judge did not address this question, apparently concluding that the condition was not compensable if it was aggravated only by the work.

The Appeals Board agrees that claimant's condition would be compensable if the evidence establishes that it was aggravated, accelerated, or intensified by her work. Claphan v. Great Bend Manor, 5 Kan. App. 2d 47, 611 P.2d 180, *rev. denied* 228 Kan. 806 (1980). This substantially more difficult issue is the factual one, namely whether the evidence establishes such an aggravation, acceleration, or intensification.

Two medical experts expressed opinions regarding causation. Dr. Steven J. Howell states in his report of November 8, 1996:

"The other question that comes to mind is, how much of her pain is due to her injury at Boeing? Based on the available information that I have, I would have to say that she probably had a congenital foot problem to begin with, with, in my opinion, some evidence of os naviculare formation, and there may indeed have been some avascular necrosis. And, the most likely risk factor for her having this is her history of smoking since she was a teenager. Therefore, this was a pre-existing condition. She did fall and sprain her foot, and, certainly, this can begin to loosen any of the fibrous connections between a secondary os, and the fall has to be blamed somewhat for her discomfort. Therefore, I am calling her injury and subsequent pain 50% due to her fall at Boeing and 50% due to a pre-existing condition that basically set her up for continued problems after the fall."

Dr. Howell does not state that the standing on concrete surfaces either caused, aggravated, intensified, or accelerated claimant's ankle condition. His report does, however, support the contention that the twisting of the left ankle aggravated a preexisting condition which is then fully compensable.

Dr. Jones discusses the cause of claimant's disability in several written reports and in his deposition testimony. His report of January 3, 1994, states the avascular necrosis "could" be intensified by walking and standing on cement. His July 18, 1996, report states that walking on concrete was "more likely to aggravate, accelerate and intensify the effect of avascular necrosis in her navicular."

In his deposition, he first testified that walking on concrete does aggravate avascular necrosis. On pages 24 and 25 of his deposition, however, he testified:

Q. As I understand your testimony, you can't say within a reasonable degree of probability that her job duties of standing and walking at Boeing aggravated her avascular necrosis condition. Is that correct?

A. Of which ankle?

Q. Of the right one.

A. I don't think it -- she's not really complaining of right side. Most of it is left side, so yes.

The Appeals Board concludes the evidence does not satisfy claimant's burden of proving the work activities permanently aggravated, accelerated, or intensified the disability in claimant's right ankle. The statements by Dr. Jones are not clear. One might decide that in substance he intended to say the work caused permanent aggravation, acceleration, and intensification; he simply did not use correct terms. If this were the conclusion, it would be inappropriate to dismiss the opinion. However, the Board cannot discern that this is the substance of Dr. Jones' opinion in the key question. Even if Dr. Jones' opinion is understood as an opinion that standing on concrete aggravated the avascular necrosis in claimant's right ankle, he does not explain what he means by "aggravated." The term is sometimes used to describe a temporary increase in symptoms. Given the nature of avascular necrosis, the term "aggravation" needs clarification in this context to support an award for permanent disability. In addition, Dr. Jones' testimony indicates he cannot state within a reasonable degree of probability that the standing on concrete aggravated the avascular necrosis. The Board, therefore, concludes that the Award, based on injury to only the left ankle, should be affirmed. The Award will be modified only by the stipulated addition of the healing period.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish, dated February 24, 1997, should be, and is hereby, modified.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Ardoth E. Hilton, and against the respondent, The Boeing Company - Wichita, and its insurance carrier, Aetna Casualty & Surety Company, for an accidental injury which occurred September 15, 1992, and based upon an average weekly wage of \$799.91, for 161.15 weeks of temporary total disability compensation at the rate of \$299 per week or

\$48,183.85, followed by 5.25 weeks at the rate of \$299 per week or \$1,569.75, for a 15-week healing period and a 12% permanent partial disability, making a total award of \$49,753.60 which is presently due and owing.

The Appeals Board also approves and adopts all other orders in the Award.

IT IS SO ORDERED.

Dated this ____ day of August 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kelly W. Johnston, Wichita, KS
Eric K. Kuhn, Wichita, KS
Randall C. Henry, Hutchinson, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director